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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM PETER BLATTY,

Petitioner,

vs.

NEW YORK TIMES COMPANY, and DOES 1 through 10, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. To what extent does the First Amendment require that guidelines developed in the context of defamation be applied to other tort causes of action?

(a) Does the First Amendment require that all "injurious falsehood" causes of action against a media defendant must satisfy not only the "actual malice" standard but all the elements of defamation actions even if such elements are not part of the causes of action alleged?

(b) Specifically, where a plaintiff alleges that a media defendant knowingly

published false statements with the purpose of interfering with plaintiff's prospective business advantage, does the First Amendment require that the "of and concerning" element of a defamation action be satisfied?

2. Does the First Amendment insulate a media defendant which markets a product by means of a deliberate and knowing false statement not of and concerning a particular person from liability to those harmed by such false statement?

3. May a state court which decides a Federal constitutional issue on the basis of federal precedents nevertheless preclude review by this Court by formalistic invocation of state grounds?

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM PETER BLATTY, PETITIONER

v.

NEW YORK TIMES COMPANY and DOES 1 through 10, inclusive, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

WILLIAM PETER BLATTY petitions for a Writ of Certiorari to review the judgment of the California Supreme Court in this case.

OPINION BELOW

The opinion of the California Supreme Court (App. 62) is reported at 42 Cal.3d 1033, 728 P.2d 1177, 232 Cal.Rptr. 542 (1986).

JURISDICTION

The judgment of the California Supreme Court was entered on December 29, 1986. App. 62, 103, 104. A petition for rehearing was denied on February 26, 1987. App. 110. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20.4, this petition is timely filed if filed by May 27, 1987, i.e., ninety days from the date on which the petition for rehearing was denied.

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the United

States Constitution provides in pertinent part:

> "Congress shall make no law... abridging the freedom of speech, or of the press..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

William Peter Blatty, author of The Exorcist, sued the New York Times Company ("the Times") for its failure to include his 1983 novel, Legion, on its weekly Best Seller List alleging, inter alia, intentional interference with prospective advantage. Blatty claimed that the Times intentionally excluded Legion from the List even

though the Times was aware that Legion had sold more than enough copies to qualify for the List and that the novel was in all other respects fully qualified to be so included. Blatty alleged that the Times promoted and commercially marketed its Best Seller List as an accurate and objective measure of weekly book sales when the Times knew that the List was neither accurate nor objective.[1/] Blatty also alleged that the Times acted with full knowledge that exclusion from its Best Seller List would cause substantial economic harm to an author since the Times was aware that the List was heavily relied upon by booksellers in their marketing

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1/ The legend below the List read at the time of the suit (it has since been modified): "The listings above are based on computer-processed sales figures from about 2000 bookstores in every region of the United States." The Times contended that said legend did not contain a statement of fact.

of books. In fact, the Times promoted and commercially licensed use of the List for precisely such purposes. The advantages to authors whose books appear on the List are substantial because such books are more prominently displayed and are sold at a discount thus promoting more sales. App. 2-12.

The law and motion court sustained the Times' Demurrer to Blatty's First Amended Complaint and dismissed the Complaint without leave to amend.

The Court of Appeal reversed the trial court with respect to two counts of the First Amended Complaint, both of which claimed an intentional interference with prospective business advantage.[2/] App. 25, 60.

2/ The first such count was premised upon the actual publication of the Best Seller List in the New York Times and in the New York Times Book Review. The second count was premised upon the commercial promotion, marketing and licensing of that List by the Times to various booksellers throughout the world who then use the List as a device to

The three judge Appellate Court panel unanimously concluded that Blatty had properly alleged each element of the tort:

> "The elements of a cause of action for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption thereof; and (5) damages to plaintiff proximately caused by the act of the defendant... The amended complaint sets forth each of these elements." App. 52-53.
>
> * * *
>
> "The tort of interference with prospective advantage lies for interference with relations which are merely prospective or potential. (See Buckaloo v. Johnson, supra, 14 Cal. 3d 815, 822; Smith v. Superior Court, supra, 151 Cal.App.3d 491, 501-502; Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 375.)" 3/ App. 56.

Fn. 2/ Cont.) to promote the sale of books appearing on the List.

3/ Gold involved an unsuccessful candidate

The Appellate Court unanimously concluded that the First Amendment did not create an absolute bar to such claims since the complaint alleged that the Times had falsely, and with knowledge of its falsity, represented its Best Seller List as accurate and objective, citing Gertz v. Welch, 418 U.S. 323, 340 (1974).

The California Supreme Court reversed the Court of Appeal's judgment with respect to the intentional interference claims. In so doing, the state high court held that the First Amendment was an absolute bar to those claims (and to other claims of unfair com-

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fn. 3/ Cont. for election who had been endorsed by the Democratic Party. Gold brought an action against the Los Angeles Democratic League alleging that the League mailed a pamphlet to prospective voters falsely implying that a competitor was the endorsed Democratic Party candidate. Gold's name was not mentioned. Gold alleged the misrepresentation was done knowingly and with intent to interfere with his opportunity to obtain votes of prospective voters held a cause of action was stated.

petition and false advertising) since Blatty had failed to allege that the false representations made by the New York Times were "of and concerning" him. App. 92, 93, 101, 102. The Court's discussion of the "of and concerning" requirement was necessarily grounded in defamation cases since it is that context to which this requirement is directly relevant. The Court concluded, however, that the "of and concerning" requirement must be applied to all injurious falsehood claims regardless of the context or of the nature of the underlying tort. App. 85. To do otherwise would increase the potential for lawsuits against the press, App. 86, 87, 91, and would pose "an unjustifiable" threat to society.[4/] App. 87.

4/ The dissent rejected this reasoning but concurred in the result, inexplicably asserting that intentional conduct was not alleged despite allegations directly on point. App. 109, 12-15.

REASONS FOR GRANTING THIS PETITION

A. This Unprecedented Decision Insulates the Press From Effects of Knowing Falsehood.

By a 4-3 margin, and for the first time in American jurisprudence, a court held that the First Amendment requires an "of and concerning" element for any cause of action involving a claim of injurious falsehood against a press defendant.[5/]

The effect of this holding is to insulate the press from liability for the ill-effects of even the knowing falsehood. This conclusion is based upon a misreading of this Court's decisions and, in fact, is quite inconsistent with several of those decisions.

5/ The California Supreme Court's decision appears to make a distinction between media and non-media defendants, e.g., App. 65, 66, 78 and 82. In Dun & Bradstreet v. Greenmoss Builders 472 U.S.____, 86 L.Ed.593, 105 S.Ct._____, (1985), at least 6 members of this Court rejected any such distinction. (L.Ed. 611, 618)

Unfortunately, considering the prestige of the California Supreme Court, the decision is bound to exert substantial influence on developments of the law in this context where there is already a complicated and confusing overlay of First Amendment considerations. The predictable result is the Frankenstein-like creation of a plethora of torts fabricated with weird and irrelevant appendages. This Court should intervene before the First Amendment is further subjected to such careless experimentation.

The decision of the California Supreme Court raises an important question of federal constitutional law: to what extent must specific First Amendment guidelines developed in the context of defamation be applied wholesale to tort causes of action that do not sound in defamation? The position of the California Supreme Court is that those

requirements must be applied jot for jot, bag and baggage, regardless of the relevance of the particular requirement to the underlying tort and regardless of any countervailing considerations. The breadth of the holding cuts a wide swath from invasion of privacy to interference with prospective advantage to unfair competititon to fraud to 10b5 violations or, for that matter, to any claim that happens to allege as a factual premise an injury caused by something a media defendant published.

For example, a newspaper columnist who lies in his financial column about a stock he owns to induce the public to buy it so its price will rise and he can sell at a profit would be insulated from liability because no purchaser-plaintiff will be able to show the falsehood was "of and concerning" him. Apparently, the result would be different if a businessman engaged in the

same scheme without the media being involved. See Fn. 5, supra.

B. Decision Directly Conflicts With Decision of United States Court of Appeals.

In addition, the decision of the California Supreme Court is in direct conflict with a recent decision of the United States Court of Appeals for the Fourth Circuit, Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), rehearing in bank denied, 805 F.2d 484 (1986), cert. granted sub nom. Hustler Magazine v. Falwell, ___U.S.___, 55 U.S.L.W. 3661, March 30, 1987.

C. A Formalistic Invocation of State Grounds Should Not "Cert.-Proof" Decision and Preclude Review Where Decision in Fact Rests on Federal Grounds.

Finally, the California Supreme Court, while in fact relying on Federal cases to

reach its decision,[6/] appended a footnote at the very end of the majority opinion:

> "Throughout this opinion we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 2 of the California Constitution. It is the latter on which we primarily rely."

This Court should intervene to assert that the question of independent and adequate state grounds should be determined by what a state court does rather than what it says it did.

For these reasons, the importance of the questions presented and the conflict with a decision of a federal court of appeals, the Petition should be granted. Sup. Ct.

6/ The opinion actually invokes and relies upon the supremacy clause: "Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment." App. 99, 100.

Rule 17.1(b) & (c).

I. THE OPINION BELOW MISUNDERSTOOD AND MISAPPLIED THE FIRST AMENDMENT DECISIONS OF THIS COURT.

After a generalized discussion of the political and social importance of the First Amendment and of this Court's abrogation of strict liability in the context of defamation, the California Supreme Court stated, "In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning', the plaintiff in some way." App. 81. In so stating, the Court relied upon an unjustifiably broad interpretation of this Court's decision in Rosenblatt v. Baer, 383 U.S. 75 (1966).

From this bare premise, the California Supreme Court concluded that the "of and concerning" requirement must also be

satisfied whenever a plaintiff seeks redress for a non-defamatory injurious falsehood regardless of the nature of the underlying tort. App. 82, 83. The Court offered two reasons for this leap in logic:

(1) Something must be done to stop plaintiffs from successfully suing the press, or, in the words of the opinion:

> "In recent years plaintiffs suing press defendants have more frequently affixed labels other than defamation to injurious falsehood claims and have increasingly achieved some measure of success in these actions." App. 91.

(2) Only direct reference statements cause harm:

> "[t]he 'of and concerning' or specific reference requirement limits the right of action for <u>injurious falsehood</u>, granting it to those who are the direct object <u>of criticism</u> and denying it to those who merely complain of non-specific statements that

they believe cause them some hurt." App. 88. (Emphasis added.) 7/

The California Supreme Court's invocation of the First Amendment is wrong for at least three reasons. First, Rosenblatt does not support the broad contentions for which the California Supreme Court cites that decision. Next, to the extent Rosenblatt does impose an "of and concerning" limitation on defamation causes of action, this Court has never held that such a requirement must or even should be imposed on non-defamation torts. Indeed, this Court's rulings are quite to the contrary.

Although the First Amendment may apply to all tort claims premised on speech or publication, the scope and effect of

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7/ The underlined words expose the fallacy in the Court's reasoning - not all injurious falsehood is criticism. The formulation also assumes the plaintiff's allegations of damage are unfounded. That is not a question to be decided upon a pleading.

that application will depend on the specific nature of the interests at stake, not upon the incantation of platitudes and rules excised from other contexts. That was made abundantly clear in Time v. Hill, 385 U.S. 374, 390, 391 (1967), one of the first cases to interpret New York Times v. Sullivan, 376 U.S. 254 (1964), in a non-defamation case context:

> "...This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times [v. Sullivan] guide our conclusion, we reach that conclusion only by applying these principles in this discrete context." (Emphasis added.) 8/

Finally, in the discrete context of

8/ In Time v. Hill, this Court also made the salient point that: "The constitutional principles can tolerate sanctions against calculated falsehoods without significant impairment of their essential function." (at 389) (Emphasis added.) A calculated falsehood is precisely what was alleged herein.

this case, there is no basis in law, logic or commonsense for the imposition of the "of and concerning" requirement on the specific tort at issue here. A defendant can, with acts or words, intentionally and maliciously damage a plaintiff's economic relationships without ever making a direct reference to the plaintiff or to the plaintiff's property. The essence of the tort is not criticism of the plaintiff, but the intentional damaging of plaintiff's economic relationships, regardless of the method chosen. To require the "of and concerning" element in the context of this type of concern is simply inexplicable. Certainly the First Amendment imposes no such requirement.

A. Rosenblatt v. Baer Inapplicable.

The California Supreme Court misunderstood and, as a consequence, misapplied

the holding in Rosenblatt v. Baer, 383 U.S. 75 (1966). The California Supreme Court described that holding as follows:

> "In that case, the United States Supreme Court held that a defamation plaintiff could not constitutionally establish liability without satisfying the ["of and concerning"] requirement even though the governing state law imposed no such prerequisite: 'under New York Times...[the plaintiff is] required to show specific reference'." App. 82.

(quoting Rosenblatt; emphasis supplied by California Supreme Court). In fact, the Rosenblatt court decided a much narrower point, namely, that, after a full trial on the merits, "in the absence of sufficient evidence that the [alleged defamation] focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations." 383 U.S. at 80. (Emphasis added.)

The California Supreme Court's assumption that Rosenblatt applies beyond a defamation case involving a specific "attack on governmental operations" context is unwarranted and unexplained. Aside from its specific impact in this case, this assumption invites further complications in the already complex First Amendment overlay on defamation. In any event, that assumption is certainly not justified by the Rosenblatt Court's description of the precise rationale behind its holding:

> "The jury was permitted to award damages upon a finding merely that respondent was one of a small group acting for an organ of government, only some of whom were implicated, but all of whom were tinged with suspicion. In effect, this permitted the jury to find liability merely on the basis of his relationship to the government agency, the operations of which were the subject of discussion... A theory that the [publication] cast indiscriminate suspicion on the members of the group responsible

> for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient.
> 383 U.S. at 82-82 (emphasis supplied)

Thus, although the Rosenblatt Court appeared to impose the specific reference element of defamation actions as a First Amendment requirement, it did so only in the context of generalized criticisms of governmental operations. This Court has never applied Rosenblatt beyond that narrow context.

The California Supreme Court, on the other hand, took Rosenblatt's very specific holding, generalized it and then leap-frogged that generalization into novel and more than somewhat illogical doctrine. Unfortunately, the California Supreme Court supplied neither reason nor direction in its cryptic, but substantial, expansion of

Rosenblatt.[9/]

B. First Amendment Does Not Require "Of and Concerning" Element to Be Added to Interference Tort.

Assuming arguendo that Rosenblatt v. Baer did establish a generally applicable "of and concerning" requirement for all defamation causes of action, no decision by this Court has ever indicated that the First Amendment requisites of a defamation cause of action must be applied mechanically to other non-defamation torts. Time v. Hill, supra.

In Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977),

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9/ The California Supreme Court's discussion of Rosenblatt is limited to two sentences. App. 81, 82. Hence, it is not possible to understand how that court arrived at its interpretation of Rosenblatt other than as a convenient means to achieve a desired result.

this Court made it quite clear that First Amendment limitations placed upon one tort are not automatically transferable to another. According to the Zacchini Court, the scope of First Amendment limitations to any particular tort action will depend on the specific nature of that tort and the state interests the tort is designed to advance or protect. Those factors will be counterposed against relevant First Amendment concerns to determine the nature and extent of any constitutional limitation.

Zacchini involved the memorable case of the "Human Cannonball" whose entire act, a fifteen second cannonshot through space, was aired by a local news broadcast. Mr. Zacchini sued the station for tortious appropriation of his right of publicity. The Ohio Supreme Court agreed that Mr. Zacchini did have such

right. However, relying heavily on Time v. Hill, supra, a case in which this Court applied the New York Times v. Sullivan actual malice standard to a cause of action for false light invasion of privacy, the Ohio Supreme Court disallowed Zacchini's right of publicity claim since it concluded that the broadcast was privileged under the First Amendment.

This Court reversed, holding that the rationale behind the protections afforded in Time v. Hill was not relevant to the right of publicity tort. In this regard, the Court noted significant differences between the privacy tort at issue in Time v. Hill and the right of publicity. These differences made transfer of First Amendment limitations from one tort to the other inappropriate.

"'The interest protected' in

> permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation'. [Citation] By contrast, the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." 433 U.S. at 573.

Based on these distinctions, the Court concluded that the First Amendment did not require application of defamation's actual malice standard to the right of publicity tort. Neither it nor the premises upon which it was founded were relevant to that tort.

The tort at issue here, intentional interference with prospective business advantage, closely resembles the right of publicity at issue in Zacchini both in terms of a similarity of purpose and a shared dissimilarity

with the torts of false light invasion of privacy and defamation. With respect to both intentional interference with prospective business advantage and the right of publicity, the state has an interest in promoting economic activity and of rewarding and protecting those who are so engaged. Both torts are designed to accomplish just that. Moreover, neither tort is premised upon the protection of "feelings or reputation". 433 U.S. at 573. By way of contrast, both false light invasion of privacy and defamation are premised upon the protection of feelings and reputation. Hence, by a parity of reasoning with the Zacchini Court, the First Amendment limitations on defamation and privacy are not automatically transferable to a cause of action based upon intentional interference with prospective business advantage. The California Supreme Court's conclusion to the contrary is simply

wrong.

The California Supreme Court's decision is also inconsistent with this Court's opinion in Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974). Although that case involved the extent to which the First Amendment limited a defamation action brought by a private person, the approach and reasoning adopted by the Court seems particularly appropriate here. In essence, the opinion in Gertz represents an accommodation of the state's interest in protecting the reputation of private citizens with the First Amendment's protection of a free press. Before striking the appropriate balance, the Gertz Court observed:

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, wide-open' debate on public

issues." 418 U.S. at 340.

Hence, regardless of the balance struck, absolute protection of the knowing lie is never justified on First Amendment grounds.

C. California Supreme Court Failed to Balance Interests in Its Analysis.

Here, the California Supreme Court simply assumed that the prevention of lawsuits against the press was the paramount constitutional concern. App. 86-91. Thus, it concluded that a device or pleading limitation that would eliminate such lawsuits was not only a positive good, but a mandate of the First Amendment. The Court performed no balancing of the various interests at stake (e.g., it did not even mention Mr. Blatty's interest as an author to be free from unfair impingement of his First Amendment rights to express and disseminate his ideas); nor did

it consider that its rule protected the knowing falsehood published with a malicious intent. Neither the First Amendment nor any opinion by this Court requires such a result.

The scope of the court's decision here can best be appreciated by considering the total irrelevance of the "of and concerning" requirement to the interest at stake in a claim of intentional interference with prospective advantage. In the context of defamation, that requirement is designed to ensure that it is the plaintiff's reputation that has been impugned. The defamatory statement must refer to him. Placed in this context, the requirement does not undermine the legitimate state interest, rather it ensures that the state's interest in the protection of reputation is being advanced in a narrowly tailored fashion that does not unncessarily tread upon the First

Amendment. Stated in the converse, the state's interest in the protection of reputation is not materially advanced by permitting a person to sue based on a statement that does not expressly or implicitly refer to that person.

On the other hand, the "of and concerning" or specific reference requirement has no relevance to the state's legitimate interest in preventing the disruption of economic relationships. It is, quite simply, wholly out-of-place in that context. Rather than ensuring that the state's interest is advanced in a narrowly tailored fashion, the rule completely ignores the state's interest. Indeed, a mechanical application of this requirement is an invitation to disrupt such relationships through carefully planned subterfuge that scrupulously avoid reference to the potential plaintiff. True, imposition of the "of and concerning" rule will bar

lawsuits against the press, but with no more relevance than would a rule limiting the liability of the press to cases in which the plaintiff is over six feet tall.

As this Court held in Zacchini, the limitations imposed by the First Amendment in the context of defamation or the false light right of privacy need only be applied under circumstances in which there is some parity of purpose and design between those torts and the one to which application is being considered. There is absolutely no such parity here.

This is not to say that the First Amendment does not apply to the intentional interference with prospective business advantage alleged here. (In this case, actual malice has been alleged.) Rather, it is to suggest that the extent of its applicability must be determined in a manner which comprehends the basic purpose for

which the particular tort was created and which then gives due consideration to the interests being protected by that tort. The California Supreme Court in its rush to shield the media from "creative pleading" failed to take these significant factors into account.

D. The Decision of the California Supreme Court is in Conflict With a Recent Opinion By the United States Court of Appeals for the Fourth Circuit.

In Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), rehearing in bank denied, 805 F.2d 484 (1986), cert. granted sub nom. Hustler Magazine v. Falwell, __U.S.__, 55 U.S.L.W. 3661, March 30, 1987, the Fourth Circuit Court of Appeals held that although the First Amendment applied to a claim for intentional infliction for emotional distress, its application would not be rigidly controlled by special rules developed in the

context of defamation. The role of the court was to assess the nature of the specific tort at issue and then to determine how the various elements of the tort should be limited, if at all, by an application of the First Amendment.

At issue in Falwell was an "ad parody" that had appeared in Hustler Magazine. The subject of the parody was Rev. Jerry Falwell. Included in the parody were a number of falsehoods, including details of an apocryphal incestuous rendezvous Falwell was said to have had with his mother. Falwell sued the publishers of Hustler claiming libel, invasion of privacy and intentional infliction of emotional distress. The invasion of privacy claim was dismissed by the trial court and the jury found in defendant's favor on the libel claim. However, the

jury returned a verdict favorable to Falwell for intentional infliction of emotional distress.

On appeal, the defendant argued that the First Amendment barred recovery for intentional infliction of emotional distress since Falwell, as a public figure, could not prove "actual malice". The Fourth Circuit agreed with defendants that Falwell was a public figure and that defendants were, therefore, entitled to the same level of protection they would have received in an action for libel. 797 F.2d at 1274. "To hold otherwise would frustrate the intent of New York Times and encourage the type of self censorship which it sought to abolish." Id. Having determined the level of protection, the question was what form that protection should take. In this regard, the Court concluded that a direct application of

the actual malice standard as developed in defamation law would be inappropriate. After tracing the history of the actual malice standard, the Court observed:

> "When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature." 797 F. 2d at 1275 (Emphasis added.)

In short, much like the approach adopted by this Court in Zacchini, the Fourth Circuit in Falwell concluded that application of the First Amendment would be determined by a careful assessment of the nature of the tort at issue. The Fourth Circuit went on to conclude that an action for intentional infliction of

emotional distress, as developed under Virginia law, met the requisite level of fault mandated by the First Amendment.

The California Supreme Court cited and discussed the Falwell decision. App. 98, 99. In so doing, it specifically rejected the reasoning and conclusions of the Fourth Circuit. App. 99, 100. Accordingly, the decision of the California Supreme Court is in direct conflict with a recent decision of a federal circuit court on the precise question presented by this Petition: to what extent does the First Amendment require that guidelines developed in the context of defamation be applied wholesale to tort causes of action that do not sound in defamation? The answer of the California Supreme court is that those guidelines must be rigidly enforced in non-defamation torts; the answer of the Fourth Circuit is that rigid application of the guidelines is

neither required nor appropriate. This Court should resolve the conflict.

On March 30, 1987, this Court granted the Petition for Certiorari in the Falwell case. The first question[10/] raised in that Petition asks this Court to determine which requirements of defamation actions are by reason of the First Amendment applicable to a non-defamation tort. That is the issue in the instant case albeit in regard to a different tort.

Considering the identity of the questions presented and considering the divergent approaches adopted by the respective courts, consolidation of this case with Falwell would seem particularly appropriate. Consolidation would give the Court an oppor-

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10/ "Are First Amendment defenses applicable to libel also applicable to claims of intentional infliction of emotional distress when such claims are based upon alleged injurious falsehoods." 55 U.S.L.W. 3649-50.

tunity to address in the context of two different torts and two different approaches, an important subject of constitutional law: First Amendment requirements in non-defamation cases.

II. THE FIRST AMENDMENT DOES NOT INSULATE A MEDIA DEFENDANT FROM LIABILITY FOR FALSE STATEMENTS IN MARKETING A PRODUCT.

The Second Cause of Action specifically excludes the normal sale of the newspaper and focuses on the List as a product. The N.Y. Times' false claim (that its Best Seller List is based on computer-processed sales figures from about 2000 stores in every region of the United States) may be the very thing that makes its List appear superior to other lists (which make no such claim) and, thus, enables the N.Y.Times to market the List as a product (apart from the newspaper) so successfully.

If a department store or an individual were to offer this product to bookstores based on such a false claim, there would be no question of the commercial nature of the speech.

The falsehood appears to be the basis of a multi-million dollar merchandising scheme and one which, unfortunately, holds economic life and death power over authors' books. App. 4, 5, 6. Had there been no list at all, Mr. Blatty's book would have been free to compete on its own merits. On that basis, it was selling excellently. App. 9, 10. It took the N.Y. Times false statements in connection with its Best Seller List to give an unfair competitive advantage to his competitors App. 9-12 to his resulting damage. That damage was never considered by the California Supreme Court. Allowing this suit for redress does not pose "an unjustifiabl threat to society". App. 87.

Bose v. Consumer's Union, 466 U.S. 485 (1984), 80, L.Ed. 2d 502; Virginia Board of Pharmacy v. Virginia Consumers Council, 425 U.S. 748 (1976) 48 L.Ed. 2d 346.

III. CALIFORNIA SUPREME COURT'S DECISION IS NOT BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

A. The Footnote Disclaimer.

The aforementioned formalistic disclaimer,[11/] is undoubtedly intended to satisfy the requirement of Michigan v. Long 463 U.S. 1032, 1041 (1983) that the decision below is "alternatively based on bona fide separate, adequate and independent grounds".

11/ Toward the very end of its opinion, the 4 member majority added this footnote:

> "Throughout this opinion, we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 2 of the California Constitution. It is the latter on which we primarily rely."

The question is whether the existence of the state grounds is to be ascertained by what the state court does in fact or by what it says it did. The Court is presented with the converse of the now well-settled rule that "a state court cannot confer standing in that court", since it is the United States Constitution and Acts of Congress which set jurisdiction, not the preferences of courts of lower commission (Orr v. Orr, 440 U.S. 268, 277, fn. 7 (1979), discussing Doremus v. Board of Education, 342 U.S. 429, 434 (1952). Here, the question is, instead, whether a state court may deny jurisdiction to this Court by deciding a case on federal grounds but saying it did not.

The notion that state labels can prescribe this Court's jurisdiction is irreconcilable with holdings, rendered both before and after Long, establishing that the decision as to whether the state court was resolving an

independent state issue, on the one hand, or a federal issue (either solely or intertwined with state law), on the other hand, is for this Court. (See International Longshoremen's Assn. v. Davis, ___U.S.___, 106 S. Ct. 1904, 1910 (1986) and authorities collected there, and Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 1093 (1985)). This being so, this Court obviously is not bound by a state court's ipse dixit.

It is noteworthy that the Supreme Court of the nation's most populous state felt constrained to employ such an offhand and legalistic device. Had the court below been pursuing non-federal precepts or non-intertwined issues, one would have expected its decision to show that to be the case. Moreover, one would expect at least something more in the way of explanation, as distinguished from proclamation, as shown in decisions of some

other courts (see, for example, State v. Stroud, 720 P.2d 436 (Wash. 1986) Nor is there some reasonable reliance on state authority in the reasoning process of the court's opinion, a well-recognized indicator of independent state grounds (New York v. Class, ___U.S.____, 106 S.Ct. 960, 964 (1986), citing, inter alia, California v. Carney, supra, 471 U.S. 386, 105 S.Ct. 2066, 2068, fn. 1 (1985)).

B. The Opinion Relied Upon Federal Law.

The California Supreme Court's conclusion that the "of and concerning" requirement must be satisfied in all causes of action involving an injurious falsehood is unmistakeably premised upon the interpretation and application of federal case law. See App. 78 et seq.

The section of the opinion

addressing this point begins with a brief introduction that describes general and unassailable propositions regarding the breadth of protection afforded free expression. App. 78. Appropriate provisions of the federal and state constitutions are cited, as well as cases construing those provisions. Id. But beyond this introductory point, the focus of the Court's discussion is almost entirely on federal precedent. App. 79 - 91. Indeed, the only state case on which the court actually relies was itself decided on the basis of federal law. Reader's Digest Association v. Superior Court, 37 Cal.3d 244, 208 Cal. Rptr. 137, 690 P. 2d 610 (1984) (construing and applying Gertz v. Robert Welch, Inc., supra.)

Specifically, in concluding that the First Amendment required

imposition of the "of and concerning" requirement, the California Supreme Court relied primarily on New York Times v. Sullivan, supra and Rosenblatt v. Baer, supra. App. 81, 82. In addition to those authorities, seven other federal cases are cited and discussed. Bose Corporation v. Consumers Union, 466 U.S. 485 (1984); Herbert v. Lando, 441 U.S. 153 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 383 U.S. 374 (1967); Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742 (S.D.N.Y. 1981); Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893 (W.D. Mich. 1980) affd. 665 F.2d 110 (6th Cir. 1981)

By way of contrast, there are only two citations to California authority in this section of the opinion.

Reader's Digest Association v. Superior Court, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984); Kapellas v. Kofman, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969). As noted, the former was premised completely on federal decisions and the latter is cited at the end of a string of citations for the irrelevant proposition that actual malice must be established in a claim of false light invasion of privacy.

Most importantly, at no point during this discussion does the California Supreme Court even make a pretense of carving a decision that goes beyond the federal authorities. Indeed, in the discussion of Falwell v. Flynt, supra, a federal case with which the California Supreme Court disagreed, there is no suggestion that the disagreement is premised

upon an interpretation of the California Constitution that is arguably broader than the federal constitution. App. 98, 99, 100. Rather, the California Supreme Court's disagreement with the Falwell court involves an interpretation of federal law where the California court specifically invokes the supremacy clause. App. 99, 100. See Fn. 6 Supra. In sum, the only rational interpretation of the California Supreme Court's opinion is that the result was mandated by federal constitutional law.[12/]

12/ This interpretation of the opinion is bolstered by the headnotes found in the official and unofficial reporters. 42 Cal.3d at 1034-36, ___P.2d at ___ to___, 232 Cal.Rptr. at 543 to 545. Although these headnotes are not officially part of the case, they do provide insight into future interpretations and applications of this decision. In each of the headnotes pertinent to the issues raised here, the decision and specific point is described as a construction of the First Amendment to the United States Constitution. Most importantly, in no headnote in any of the reports is the California Constitution ever cited.

C. Michigan v. Long.

The footnote disclaimer (see note 11, supra,) is ambiguous and only muddies the turbulent waters Michigan v. Long, 463 U.S. 1032 (1983) intended to calm.

In Long, this Court voiced its concerns regarding the difficulty of determining whether state court decisions rested on state or federal grounds when a state court decision relies upon both state and federal precedent. All too often federal and state law grounds were intermixed, leaving the basis for the decision unclear and the propriety of this Court's jurisdiction unreasolved. 463 U.S. at 1040. The need for constant clarification imposed a burden on state courts and their ability to develop state law unimpeded; on the other hand, outright dismissal of such cases undermined the "important need for uniformity in federal law." Id.

Because of these concerns and the related implications for judicial review and principles of federalism, this Court concluded that the then prevalent practice of remanding for clarification could no longer be justified. A middle ground between that practice and outright dismissal was needed. The Court stated,

> Accordingly, when as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-41.

That presumption is fully applicable here. Any fair reading of the opinion of the California Supreme Court indicates that it rests primarily, if not exclusively, on federal law. Indeed, much like the decision

of the Michigan Supreme Court in Long, the overall thrust of the opinion here is grounded in federal precedent. Undoubtedly this decision will be interpreted by future courts and litigants as an application of federal law. See note 12, supra. This Court should treat it as such.

Of course, as this Court in Michigan v. Long made clear, the presumption that a decision rests on federal grounds can be rebutted by inclusion of a "plain statement" indicating that state and not federal law controlled the outcome of the decision. The Long Court stated,

> If a state court chooses merely to rely on federal precedent as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alterna-

> tively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

463 U.S. at 1041. The California Supreme Court's equivocal disclaimer does not qualify as a clear and express statement of the grounds of decision. At most it confuses matters and leaves both state and federal law in an ambiguous posture.

First, nothing in the purported disclaimer makes it clear that federal cases "are being used only for purposes of guidance, and do not themselves compel the result that the court has reached." The opinion itself, taken as a whole, certainly suggests a much broader role for the federal precedent. In the absence of a more specific statement to the contrary, one can hardly be faulted for continuing to adhere to this most logical presumption.

Moreover, even if the California

Supreme court is relying primarily on the state constitution, it remains unclear whether that constitution is being interpreted and applied by force of the federal precedents cited and discussed or whether those precedents are merely being used as persuasive authority in the interpretive process. Thus, while it may be true that this case is primarily a construction of the California Constitution, it appears that, in the opinion of the California Supreme Court, this construction is mandated by federal case law.

Hence, even accepting the "plain statement" found in the footnote at the end of the Court's opinion, the decision is not independent of federal law. Rather, the California Constitution has been construed in a particular manner by force of federal law. See Fn. 6 supra.

Second, the footnote disclaimer does not "clearly and expressly [indicate] that it is alternatively based on bona fide separate, adequate and independent grounds". Far from clear and express, the footnote disclaimer read in the context of the overall decision is a bundle of ambiguity. Moreover, this ambiguity, if adequate under Michigan v. Long, gives the California Supreme Court the best of both worlds. Its decision is insulated from review by this Court, yet the actual basis for the decision is sufficiently ambiguous to operate as a potential precedent in the development of federal constitutional law. See footnote 12, supra.

This is precisely the type of ambiguity Long sought to eliminate. In a sense, the California Supreme Court has undermined Long by paying lip service to Long's requirement of a plain statement.

An analysis of the opinion reveals it derives wholly from the force of federal constitutional law. With the addition of the disclaimer, the clarity is diminished by a suggestion that to some unarticulated extent, California authority may have provided the guiding principles. Hence, this Court, as well as future courts and litigants, are served a hodgepodge of federal and state law, the basis of decision not clearly resting on either.

The California Supreme Court's attempt to comply with Long while at the same time it undermines the very foundations of that decision does not establish a bar to this Court's jurisdiction. Rather, this attempt at judicial legerdemain provides a separate and substantial basis for this Court's intervention. If Long is to retain any vitality, this Court should make it clear

that the California Supreme Court has not satisfied the most basic requirements of that decision.

IV. CONCLUSION.

The California Supreme Court erroneously held, by a 4 to 3 margin, that the First Amendment requires that the "of and concerning" element of a defamation cause of action must, by force of the Supremacy Clause of the United States Constitution, be satisfied in any case in which there is a factual allegation of injurious falsehood. This is so regardless of whether the "of and concerning" element is an element of the specific tort at issue; and, according to the California Supreme Court, it remains true even if the engrafted element has no relevant bearing upon the interests being advanced by that tort. Unfortunately, considering the prestige of the California

Supreme Court, the decision is bound to reverberate throughout the other forty-nine states and within the federal circuits.

So long as the decision of the California Supreme Court remains unreviewed, it casts a long shadow over the development of tort law both within the State of California and throughout the nation. Whenever a media defendant is sued, the flag of New York Times v. Sullivan will be waved to obscure the legitimate issues presented. The Petition for a Writ of Certiorari should be granted in order to eliminate the potential pernicious effect of this decision.

Respectfully submitted,

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